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7

UNITED STATES DISTRICT COURT

9 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

10 Bio Creative, Inc., a California
11 corporation.

12 Plaintiff.

13

14 B2 Organic, Inc., a New Jersey corporation and DOES 1-10, inclusive,

Defendant.

CASE No.

COMPLAINT FOR:

1. **FEDERAL UNFAIR COMPETITION [15 U.S.C. § 1125(a)(1)(A)]**
 2. **COMMON LAW TRADE DRESS INFRINGEMENT AND UNFAIR COMPETITION**
 3. **FEDERAL UNFAIR COMPETITION [15 U.S.C. §1125(a)(1)(B)]**
 4. **VIOLATION OF CALIFORNIA ORGANIC PRODUCTS ACT [CAL. HEALTH & SAFETY CODE §§ 110810 ET SEQ.]**
 5. **STATUTORY UNFAIR COMPETITION AND FALSE ADVERTISING [B&P CODE §§17200 *et seq.*]**

DEMAND FOR JURY TRIAL

1 Plaintiff alleges as follows:

2

3 **JURISDICTION AND VENUE**

4 1. This action arises under and this Court has original jurisdiction pursuant to
5 15 U.S.C. § 1125 (false advertising), 28 U.S.C. § 1331 (federal question), 28 U.S.C. §
6 1338(a) (trademarks), 28 U.S.C. § 1332 (diversity), 28 U.S.C. § 1338(b) (unfair
7 competition), and 28 U.S.C. § 1367(a) (supplemental jurisdiction).

8

9 2. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) because a
10 substantial part of the events giving rise to the claims occurred in this judicial district.

11

12 **THE PARTIES**

13 3. Bio Creative, Inc. (“Bio Creative”) is a California corporation, with a
14 principle place of business in Costa Mesa, CA.

15

16 4. Plaintiff is informed and believes that Defendant B2 Organic, Inc. (“B2
17 Organic”) is a New Jersey corporation, which a principle place of business located at
18 41-43 Governor St, Paterson, New Jersey 07501. On information and belief, B2
19 Organic markets and sells personal care products throughout the United States,
20 including in Orange County, California, under both the B2Organic SPA and B2Nature
21 SPA trade names.

22

23 5. On information and belief, there are other individuals who make, obtain,
24 distribute, supply and sell products in violation of law, and violate Bio Creative’s rights
25 as alleged herein, but Bio Creative is ignorant of their true identity or complete role in
26 the alleged conduct and therefore sues them by the fictitious names DOES 1 to 10. Bio
27 Creative is informed and believes that each of the defendants designated as a Doe is
28 liable in some manner for the acts, omissions and injuries of which Bio Creative alleges

1 in this Complaint. Bio Creative will seek to amend this Complaint to state the true
2 identities of Does 1 through 10 when ascertained. B2 Organic and the Doe Defendants
3 are referred to collectively as "Defendants."

4

5 6. On information and belief, each of the Defendants was at all relevant times
6 acting to the fullest extent recognized by law as the agent, employee or co-conspirator
7 of each of the other Defendants and that in committing the acts and omissions alleged
8 herein and causing the injuries alleged, was acting within the scope of such agency,
9 employment, conspiracy, joint venture or partnership relationship. The Defendants
10 have committed acts in furtherance of the conspiracy, have given aid, and
11 encouragement to their co-conspirators and have ratified and adopted the acts of their
12 co-conspirators.

13

14 7. On information and belief there exists, and at all times mentioned there
15 existed, a unity of interests and ownership between individual Defendants and business
16 entity defendants such that any individuality and separateness between the individual
17 and businesses never existed or has ceased to exist, and each Defendant is in each
18 instance the alter ego of the other Defendants who control all such entities. To adhere
19 to the fiction of the Defendant entities as having existence as separate and distinct from
20 the individual Defendants or from those with them and who owned and controlled them
21 would permit an abuse of the corporate and other entity privileges, would sanction
22 fraud, and would promote injustice.

23

24

BIO CREATIVE'S TRADE DRESS

25 8. Bio Creative distributes a range of personal care products under Bio
26 Creative's distinctive BCL SPA trade dress ("BCL SPA Products").

27

28

1 9. The BCL SPA Products are available in several “sub-lines” or “flavors”
2 featuring particular ingredients or scents, which are marketed in distinctive colors. True
3 and correct color photographs of two of the BCL SPA lines, Lemongrass + Green Tea
4 Sugar Scrub, and Mandarin + Mango Dead Sea Salt Soak are shown below.

5

6

Mandarin + Mango



Lemongrass + Green Tea



10 10. The BCL SPA Products are available for purchase online through both Bio
11 Creative’s website and other online retailers, as well as various brick and mortar beauty
12 products stores in California.

13

14 11. The packaging for Bio Creative’s BCL SPA Products is consistent
15 throughout the entire line, with the only difference being changes in color for each
16 “flavor.” The BCL SPA packaging is non-functional and is either inherently distinctive
17 or, in the alternative, has acquired secondary meaning as consumers exclusively
18 associate the packaging with Bio Creative. The BCL SPA Trade Dress is the overall
19 appearance of the BCL SPA Products’ packaging and advertising, including but not
20 limited to each of the following elements individually and in combination with one
21 another: a clear, cylindrical container with a clear cap; a white label with minimal text
22

23

1 and graphics, a metallic silver band, a tri-color scheme relating to the flavor of the
 2 product, and the word SPA prominently written in capital letters.

3

4 12. Since at least as early as June 2012, Bio Creative has continuously used
 5 the BCL SPA Trade Dress in connection with personal care products in commerce in
 6 the United States. As a result of its continuous use and success, Bio Creative has built
 7 goodwill and value in the BCL SPA Trade Dress such that consumers associate the
 8 Trade Dress exclusively with Bio Creative.

9

10 DEFENDANTS' INFRINGING PRODUCTS

11 13. Bio Creative recently discovered that Defendants are manufacturing,
 12 distributing, and selling in the United States personal care products using the marks
 13 B2Organic SPA and B2Nature SPA (the "Accused Products"). The packaging for the
 14 infringing products features elements which are confusingly similar to the BCL SPA
 15 Trade Dress without authorization by Bio Creative.

16

17 14. A non-exhaustive example of two of the lines of the Accused Products are
 18 shown below.

19

20 Orange Tangerine



21 White Tea & Aloe



22

23

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25

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DEFENDANTS' WRONGFUL ACTIVITIES

15. Defendants are manufacturing and distributing the Accused Products in an attempt to unfairly capitalize on the substantial goodwill Bio Creative has acquired in the BCL SPA Trade Dress. Defendants' advertising and sale of the Accused Products is designed to confuse and deceive consumers into believing the Accused Products are made, sponsored, or endorsed by Bio Creative.

16. The following image is a true and correct photograph of two of Bio Creative's BCL SPA products each stacked on top of the corresponding B2 Organic Accused Products.

On Top: Bio Creative's BCL SPA Products

On Bottom: B2 Organic Accused Products



1 17. The Accused Products infringe Bio Creative's rights in the BCL SPA
2 Trade Dress. Like the BCL SPA Trade Dress, the packaging for the Accused Products
3 features a clear cylindrical container with dimensions nearly identical to the packaging
4 for the BCL SPA Products. The Accused Products' packaging also features a white
5 label with the word "SPA" prominently displayed in all caps, and a tri-color scheme
6 with a silver band in a similar position to the BCL SPA Products' silver band. Further,
7 many of the Accused Products feature colors that are nearly identical to the colors
8 featured on corresponding BCL SPA Products.

18. On information and belief, the Accused Products are advertised and sold in
beauty supply stores and various online retailers.

13 19. On information and belief, Defendants knew about Bio Creative and the
14 BCL SPA Products and Trade Dress when designing the packaging of the Accused
15 Products.

17 20. The trade dress and marketing efforts for the Accused Products have been
18 created and used in such a way to promote confusion in the marketplace. On
19 information and belief, the acts of Defendants were willful and were committed with
20 the intent to cause confusion, mistake, or to deceive.

**FIRST CLAIM FOR RELIEF
FOR FALSE DESIGNATION OF ORIGIN
AND UNFAIR COMPETITION UNDER 15 U.S.C. § 1125
(AGAINST ALL DEFENDANTS)**

27 21. Bio Creative alleges and incorporates by reference each and every
28 allegation contained in Paragraphs 1 through 20.

1 22. The BCL SPA Trade Dress is inherently distinctive as product packaging,
2 or, in the alternative, has acquired secondary meaning and is uniquely associated with
3 Bio Creative in the minds of consumers.

4

5 23. The Accused Products infringe on Bio Creative's rights in the BCL SPA
6 Trade Dress by confusing or deceiving consumers that Bio Creative is the source or
7 sponsor of the Accused Products. Defendants' use constitutes infringement of the BCL
8 SPA Trade Dress and unfair competition in violation of 15 U.S.C. §1125(a).

9

10 24. Defendants' acts have caused and will continue to cause Bio Creative to
11 suffer injury to its business, goodwill, and property.

12

13 25. Bio Creative has no adequate remedy at law. Defendants' acts and
14 omissions as alleged here will require lengthy judicial proceedings and will cause
15 damages to Bio Creative that are difficult, if not impossible, to measure. Accordingly,
16 unless Defendant is preliminarily and permanently enjoined from committing the
17 unlawful acts alleged, including infringement of the BCL SPA Trade Dress, Bio
18 Creative will continue to suffer irreparable harm.

19

20 26. On information and belief, Defendants, in engaging in the conduct
21 described herein, knowingly, intentionally, and willfully intended to trade on the
22 goodwill of BCL SPA Trade Dress and cause injury to Bio Creative. As such, this is an
23 exceptional case within the meaning of 15 U.S.C. §1117(a) and attorneys' fees should
24 be awarded.

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**SECOND CLAIM FOR RELIEF
FOR COMMON LAW TRADE DRESS INFRINGEMENT
AND UNFAIR COMPETITION
(AGAINST ALL DEFENDANTS)**

27. Bio Creative alleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 20.

9 28. Defendants' actions constitute infringement of Bio Creative's common law
10 rights in the BCL SPA Trade Dress, and will confuse and deceive the public concerning
11 the source, affiliation, or sponsorship of the Accused Products.

13 29. In performing the acts and unfair business practices alleged, Defendants
14 are engaging in unlawful and unfair competition in violation of Bio Creative's rights.

16 30. As a direct and proximate result of Defendants' unlawful acts alleged
17 herein, including infringement of the BLC SPA trade dress, Bio Creative has suffered
18 and will continue to suffer injury to its business, goodwill, and property.

20 31. On information and belief, Defendants' acts and omissions as alleged
21 herein were committed knowingly, intentionally, and willfully, with the intent to trade
22 on Bio Creative's goodwill in the BLC SPA products and trade dress.

24 32. Bio Creative has no adequate remedy at law. Defendants' acts and
25 omissions as alleged here will require lengthy judicial proceedings and will cause
26 damages to Bio Creative that are difficult, if not impossible, to measure. Accordingly,
27 unless Defendant is preliminarily and permanently enjoined from committing the

1 unlawful acts alleged, including infringement of the BCL SPA Trade Dress, Bio
2 Creative will continue to suffer irreparable harm.

4 33. On information and belief, Defendants, in engaging in the conduct
5 described herein, knowingly, intentionally, and willfully intended to trade on the
6 reputation and goodwill of Bio Creative, the BLC SPA trade dress and products, and to
7 cause injury to Bio Creative. Accordingly, Bio Creative should be awarding punitive
8 damages.

THIRD CLAIM FOR RELIEF

FALSE ADVERTISING IN VIOLATION OF 15 U.S.C. § 1125(A)(1)(B)
(AGAINST ALL DEFENDANTS)

14 34. Bio Creative alleges and incorporates by reference each and every
15 allegation contained in Paragraphs 1 through 20.

17 35. Defendants' use of the term "organic" in connection with the labeling,
18 advertisement, promotion, and sale of the Accused Products, as well as the false
19 representations that the Accused Products are organic, constitutes false advertising in
20 violation of 15 U.S.C. § 1125(a)(1)(B).

22 36. As a direct and proximate result of Defendants' unlawful acts, Bio
23 Creative has suffered and will continue to suffer injury to its business, goodwill, and
24 property.

26 37. As a proximate result of Defendants' wrongful conduct, Defendants have
27 been unjustly enriched while Bio Creative has suffered damages of a nature and in an
28 amount according to proof at trial.

1 38. Bio Creative demands and is entitled to an accounting from Defendants,
2 including all information necessary to permit Bio Creative to determine the gains,
3 profits, and advantages that Defendants have obtained by reason of its wrongful
4 conduct described herein.

6 39. Bio Creative has no adequate remedy at law. Defendants' acts and
7 omissions as alleged here will require lengthy judicial proceedings and will cause
8 damages to Bio Creative that are difficult, if not impossible, to measure. Accordingly,
9 unless Defendants are preliminarily and permanently enjoined from committing the
10 unlawful acts alleged, including the false advertisement of the term "organic," Bio
11 Creative will continue to suffer irreparable harm. Injunctive relief is therefore
12 appropriate pursuant to 15 U.S.C. §1116 to prevent Defendants from engaging in any
13 further violations of 15 U.S.C. §1125(a)(1)(B).

15 40. On information and belief, Defendants engaged in the conduct described
16 herein, knowingly, intentionally, and willfully. As such, this is an exceptional case
17 within the meaning of 15 U.S.C. §1117(a) and attorneys' fees should be awarded.

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE CALIFORNIA ORGANIC PRODUCTS ACT
[CAL. HEALTH & SAFETY CODE §§ 110810 *ET SEQ.*]
(AGAINST ALL DEFENDANTS)

24 41. Bio Creative alleges and incorporates by reference each and every
25 allegation contained in Paragraphs 1 through 20.

27 42. The Accused Products are intended to be rubbed, poured, sprinkled, or
28 sprayed on, introduced into, or otherwise applied to the human body, or any part of the

1 human body for cleansing, beautifying, promoting attractiveness, or altering the
2 appearance, and are therefore “cosmetics” under California Health and Safety Code
3 §109900.

4

5 43. On information and belief, the Accused Products contain less than 70%
6 organic material. When products do not contain 70% organic material, any use of the
7 word “organic” on or in connection with those products constitutes false and
8 misleading advertising, as that term is statutorily defined and regulated within the
9 meaning of California Health and Safety Code § 110810 *et seq.* (the “California
10 Organic Products Act”). Furthermore, to be “organic” under the statute, the ingredients
11 must consist of agricultural products which have been grown “organically” without
12 certain proscribed fertilizers and pesticides, and then certified by licensed inspectors as
13 organic. On information and belief, the Accused Products do not contain at least 70%
14 organic content.

15

16 44. Defendants’ use of the term “organic” in connection with the labeling,
17 advertisement, promotion, and sale of the Accused Products, as well as the false
18 representations that the Accused Products are organic, constitutes false advertising in
19 violation of the California Health and Safety Code § 110810 *et seq.* (the “California
20 Organic Products Act”).

21

22 45. On information and belief, Defendants have not registered with the
23 Director of the Department of Health Services for the state of California pursuant to
24 California Health and Safety Code § 110875.

25

26 46. On information and belief, Defendants’ use of the term “organic” in
27 connection with the labeling, advertisement, promotion, and sale of the Accused
28 Products is in direct violation of California Health and Safety Code §110838(a).

1 47. As a direct and proximate result of Defendants' unlawful acts, Bio
2 Creative has suffered and will continue to suffer injury to its business, goodwill, and
3 property.

5 48. Bio Creative has no adequate remedy at law. Defendants acts and
6 omissions as alleged here will require lengthy judicial proceedings and will cause
7 damages to Bio Creative that are difficult, if not impossible, to measure. Accordingly,
8 unless Defendants are preliminarily and permanently enjoined from committing the
9 unlawful acts alleged, including the false advertisement of the term “organic,” Bio
10 Creative will continue to suffer irreparable harm. Injunctive relief is therefore
11 appropriate pursuant to California Health and Safety Code §111910(a).

13 49. Bio Creative seeks an award of attorneys' fees pursuant to California
14 Health and Safety Code §111910(b), as reasonably determined by the Court.

16 FIFTH CLAIM FOR RELIEF
17 FOR STATUTORY UNFAIR COMPETITION AND FALSE ADVERTISING
18 [CAL. BUS. & PROF. CODE §§ 17200 AND 17500]
19 (AGAINST ALL DEFENDANTS)

21 50. Bio Creative alleges and incorporates by reference each and every
22 allegation contained in Paragraphs 1 through 20.

24 51. Defendants' unlawful acts and practices consist of infringement of Bio
25 Creative's common law and statutory rights in the BLC SPA trade dress, as well as
26 false advertising and violations of federal and California law arising from Defendants'
27 use of the term "organic."

1 52. In performing the unlawful acts and unfair business practices alleged,
2 Defendants are engaging in unlawful and unfair competition in violation of Bio
3 Creative's rights. Defendants have obtained revenue and profit by their acts of unfair
4 competition and they should be ordered to disgorge all such revenue and profit.
5 Defendants will continue such unfair and fraudulent business practices unless and until
6 they are restrained.

7
8 53. Bio Creative has no adequate remedy at law. Defendants' acts and
9 omissions as alleged here will require lengthy judicial proceedings and will cause
10 damages to Bio Creative that are difficult, if not impossible, to measure. Accordingly,
11 unless Defendant is preliminarily and permanently enjoined from committing the
12 unlawful acts alleged, including infringement of the BCL SPA Trade Dress, Bio
13 Creative will continue to suffer irreparable harm.

14

15

PRAYER

16

WHEREFORE, Bio Creative prays for judgment as follows:

17

18

1. For preliminary and permanent injunctive relief against Defendants from
19 doing any of the following acts, either directly or indirectly, and from doing any act
20 prefatory to the prohibited acts:

21

22

a. Infringing the BCL SPA Trade Dress and any other trademark, trade
dress or other intellectual property right owned or controlled by Bio Creative;

23

24

b. Causing a likelihood of confusion, deception, or mistake as to the
source, nature, or quality of Bio Creative's goods or causing confusion,
deception or mistake as to the source, nature or quality of the Accused Products;

25

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28

1 c. Using any false designation of origin or false representation,
2 including but not limited to Defendants' use of "organic," concerning any of the
3 Accused Products.

4

5 d. Violating any statute, decision, rule or regulation of any
6 governmental entity in the course of the offering, disposition or sale of any of the
7 Accused Products, specifically including, but not limited to, violating the
8 California Organic Products Act;

9

10 2. For an order directing Defendants to file with this Court and serve on Bio
11 Creative within 30 days after service of an injunction, a report in writing under oath,
12 setting forth in detail the manner and form in which Defendants have complied with the
13 injunction;

14

15 3. For an order requiring Defendants to deliver to Bio Creative all products,
16 literature, advertising, and other material bearing any infringing trademarks or trade
17 dress or a use of any trademark or trade dress constituting federal, California state or
18 common law unfair competition;

19

20 4. For an order requiring Defendants to account for all sales and transfers of
21 any of the Accused Products, including an order that they submit to Bio Creative
22 immediately all records of all purchases, sales, and other materials pertaining to the
23 acquisition and distribution of the Accused Products;

24

25 5. For statutory damages under 15 U.S.C. § 1117(c);

26

27 6. For injunctive relief under California Health and Safety Code §111910(a).

28

1 7. For punitive and exemplary damages in an amount sufficient to punish
2 Defendants and deter such conduct in the future;

4 8. For attorneys' fees;

6 9. For costs; and

8 10. For such other and further relief as the Court deems just and proper.

10 | Dated: June 4, 2015

Mark D. Kremer
Zachary Page, members of
CONKLE, KREMER & ENGEL
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By:

Mark D. Kremer
Attorneys for Plaintiff American
International Industries

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands trial by jury of all issues so triable.

5 | Dated: June 4, 2015

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By: 
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